FILED
SEP 21 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(23)
No. 04-1152

In The
Supreme Court of the United States

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, INC., *et al.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, HUMAN RIGHTS CAMPAIGN, AND LEGAL MOMENTUM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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SEPTEMBER 21, 2005

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations dedicated to the elimination of discrimination on the basis of irrelevant personal characteristics, including sex and sexual orientation, as well as race, national origin, disability, and age, so that each person is judged based on his or her individual abilities.

Bay Area Lawyers for Individual Freedom (BALiF) is the nation's oldest and largest bar association of Lesbians, Gay Men, Bisexuals, and Transgendered persons (LGBT) in the field of law. BALiF serves to take action on questions of law and justice that affect the LGBT community; to strengthen professional and social ties among LGBT members of the legal profession; to build coalitions with other legal organizations to combat all forms of discrimination; to promote the appointment of LGBT attorneys to the judiciary, public agencies and commissions in the Bay Area; and to provide a forum for the exchange of ideas and information of concern to members of the LGBT legal community.

Human Rights Campaign (HRC), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where gay, lesbian, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 600,000 members nationwide committed to making this vision of equality a reality. HRC supports the ability of respondents to enforce non-discrimination policies that ensure equal opportunity

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

of their students to legal education and career services regardless of sexual orientation. Equal opportunity in education, especially legal education, is critical in part because of the influential position many graduates of American law schools hold in our nation's private corporations, policymaking bodies and the judiciary.

Legal Momentum (the new name of NOW Legal Defense and Education Fund) advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum is committed to promoting equality without regard to sex, and recognizes sexual orientation discrimination as indistinguishable from other forms of sex discrimination. Legal Momentum supports the law school non-discrimination policies at issue in this case because of their tremendous impact in opening the practice of law to greater participation by women and people of color as well as gay men and lesbians. Legal Momentum is also concerned that the Court's decision uphold free speech rights without eroding congressional power to promote civil rights through statutes, like Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, enacted pursuant to the Spending Clause.

SUMMARY OF ARGUMENT

Amici here address petitioners' erroneous argument (Pet. Br. 40-43) that the Solomon Amendment, 10 U.S.C. § 983, can somehow be sustained as a condition on the receipt of federal funds, even if, as respondents correctly argue, the statute unconstitutionally abridges the First Amendment rights of academic institutions as a direct regulation. *Amici* also address petitioners' flawed effort to align the Solomon Amendment with the federal civil rights statutes that are aimed at eradicating federal funding of discrimination on the basis of sex, race, and other irrelevant personal characteristics.

I.A. The unconstitutional conditions doctrine prohibits the government from denying a benefit to a person on a basis that infringes his or her constitutionally protected freedom of speech, even if the person has no entitlement to the benefit. *See United States v. American Library Ass'n*, 539 U.S. 194, 210 (2003) (plurality). The Solomon Amendment's denial of substantial sums of federal money to an academic institution for exercising its First Amendment rights is akin to, and indeed of a greater magnitude than, the denial of other federal benefits that the Court has found unconstitutionally abridged speech. *See Speiser v. Randall*, 357 U.S. 513 (1958); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). Thus, the Solomon Amendment clearly constitutes an unconstitutional penalty because it would abridge First Amendment rights if imposed as a direct government mandate, and the design of the Solomon Amendment as a condition on federal funds, instead, does not cure that unconstitutionality. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 401 n.27 (1984).

B. Petitioners attempt to avoid the unconstitutional conditions doctrine by invoking cases that rejected challenges to government conditions that were tied to particular federal spending programs. But these cases recognize only that, when the government establishes a program or subsidy for specified ends, the government may "insist[] that public funds be spent for the purposes for which they were authorized." *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). By contrast, when, as in this case, the federal benefits at issue are not limited to any one particular program, the statute must be reviewed, for First Amendment purposes, as if it were a direct government regulation of the entity.

C. Petitioners are wrong in claiming that the unconstitutional conditions doctrine prohibits government conditions on funding only if they aim to suppress ideas that the government views as "dangerous." In *National*

Endowment for the Arts v. Finley, 524 U.S. 569 (1998), the Court held that an invidious purpose on the part of the government is one ground for invalidating a condition that curtails constitutional rights when the condition applies to a selective funding program, relates directly to the underlying purpose of the funding program, and applies to the use of only the federal funds themselves. Unlike the statute in *Finley*, the government's condition here is not tied directly to a benefit that is awarded on subjective, competitive criteria.

Even if petitioners were correct that the unconstitutional conditions doctrine applies only where the government intends to suppress a specific viewpoint, the Solomon Amendment would still be invalid under that standard. The statute's express exemption for institutions that exclude military recruiters based on a "longstanding policy of pacifism based on historical religious affiliation," 10 U.S.C. § 983(c)(2), unequivocally demonstrates that the viewpoint animating an institution's policy was dispositive to Congress. Moreover, the statute and its implementing regulations allow continued federal funding of academic institutions whose exclusion of military recruiters is based on a policy that excludes all recruiters or that excludes military recruiters due to lack of student interest. Those exceptions make clear that it is an institution's viewpoint for limiting military recruiters' access, not the limitation, that is determinative of whether the institution is penalized by denial of federal funds. The events surrounding the Solomon Amendment's passage also confirm that the statute was intended to suppress a particular point of view.

II. The unconstitutionality of the Solomon Amendment does not undermine the constitutionality of the federal civil rights statutes that were enacted as conditions on the receipt of federal funds. Unlike the Solomon Amendment, those statutes meet the stringent requirements of the Court's unconstitutional conditions doctrine.

A. The federal civil rights statutes that have been enacted under the Spending Clause, Art. I, § 8, cl. 1, to prohibit federal funding of entities that discriminate on the basis of race, color, or national origin (Title VI of the Civil Rights Act of 1964), sex (Title IX of the Education Amendments of 1972), disability (Section 504 of the Rehabilitation Act of 1973), and age (Age Discrimination Act of 1975), have been uniformly upheld as valid exercises of that congressional authority.

These statutes also survive scrutiny under the unconstitutional conditions doctrine because the government has a compelling interest in avoiding funding private entities that discriminate against individuals on the basis of such irrelevant personal characteristics. *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality). Indeed, these statutes may, unlike the Solomon Amendment, reflect a constitutional prohibition against government funding of invidious private discrimination. *See Cooper v. Aaron*, 358 U.S. 1, 19 (1958); *Norwood v. Harrison*, 413 U.S. 455, 466 (1973); *Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974). The Constitution grants scant protection to the right of private entities to discriminate against individuals on the basis of irrelevant personal characteristics.

B. These civil rights statutes are distinct from the Solomon Amendment also because their primary goal is to prevent the federal government and its taxpayers from funding discrimination against taxpayers on irrelevant grounds. The injury to taxpayers from government funding of invidiously discriminatory entities is not merely a matter of citizens' disagreement with a private institution's policies. Government funding also forces some taxpayers to support financially an organization that they, themselves, could not benefit from because of irrelevant personal characteristics. The only way to achieve that compelling interest in protecting the rights of all taxpayers is to deny the funding.

By contrast, the government interest underlying the Solomon Amendment is an instrumental one. The withholding of funds is not an end in itself, but rather is being used to coerce academic institutions to speak for and associate with a discriminatory employer. That difference in governmental interest distinguishes the First Amendment challenge to the Solomon Amendment from the Court's rejection of a First Amendment challenge to Title IX in *Grove City College v. Bell*, 465 U.S. 555 (1984). *Grove City* reflects this Court's deep-seated understanding that non-discrimination conditions on financial assistance are constitutional because a proscription on discrimination based on an irrelevant personal characteristic such as sex furthers the compelling governmental interest in not subsidizing such discrimination with taxpayer's money and is the only means to achieve that interest.

C. The extension of the federal civil rights statutes to prohibit federal funding of the entirety of a discriminatory entity, as opposed to just a particular program, was necessary due to the unique nature of discrimination against individuals and the interest in not funding such conduct, which distinguishes those statutes from the Solomon Amendment's similar coverage. Any claim that federal funding restrictions on an entire academic institution is the only means to convince the institution to increase access of military recruiters to a particular program, hinges on the blunt instrument of unconstitutional coercion.

ARGUMENT

The Solomon Amendment, 10 U.S.C. § 983, denies federal funds to any academic institution that has a generally applicable antidiscrimination policy limiting the access to the campus and students of recruiters for employers who discriminate on the basis of sexual orientation

(or race or other irrelevant personal characteristics), if the institution refuses to exempt the military from that policy. The court of appeals correctly held that respondents – the Forum for Academic and Institutional Rights, Inc. (FAIR) and others – are entitled to a preliminary injunction against enforcement of the Solomon Amendment because FAIR demonstrated a likelihood of success on its claim that the Solomon Amendment violates the First Amendment rights of the academic institutions that are members of FAIR.

Although the court of appeals found the Solomon Amendment likely to violate the First Amendment, the court did not hold that Congress lacked the power under Article I to enact such statutes under its Spending Clause authority. FAIR does not challenge the statute on that ground and such a holding is not necessary or appropriate to sustain the lower court's judgment. Indeed, *amici* here are dedicated to the enforcement of other Spending Clause statutes that are aimed at eradicating federal funding of discrimination on the basis of sex, race, and other irrelevant characteristics. Unlike the Solomon Amendment, those statutes do not violate the First Amendment because they meet the stringent requirements of the Court's unconstitutional conditions doctrine for reasons we discuss in detail in Part II below.[2]

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[2] These two inquiries into a statute's constitutionality are "alternative ground[s]," *United States v. American Library Ass'n*, 539 U.S. 194, 210 (2003) (plurality), and, thus, do *not* rise and fall together. A statute can be challenged on the ground that Congress was not authorized by the Spending Clause in Article I of the Constitution (or some other constitutional grant of authority) to enact the particular legislation, *see id.* at 203 & n.2 (plurality); *Pierce County v. Guillen*, 537 U.S. 129, 147 & n.9 (2003), but an otherwise authorized exercise of Article I also can be challenged alternatively, as here, as barred by the First Amendment or some other constitutional provision. *See American Library Ass'n*, 539 U.S. at 210 (plurality); *Guillen*, 537 U.S. at 148 n.10.

I. The Solomon Amendment Unconstitutionally Conditions The Receipt Of Federal Funds On The Waiver By Academic Institutions Of Their First Amendment Rights

The refusal of academic institutions, including their law schools or other components, to include employers who discriminate on the basis of sexual orientation in various school publications, announcements, and private fora relating to recruiting, and the refusal of those institutions to exempt military recruiters from that policy, is conduct protected by the First Amendment. *Amici curiae* agree with the court of appeals' ruling to this effect and support the arguments by FAIR and the other *amici* that address that issue.

The instant *amicus* brief addresses the error in the narrower argument advanced by petitioners (Pet. Br. 40-43) that, even if the Solomon Amendment would unconstitutionally abridge the First Amendment rights of academic institutions if the restriction were imposed as a direct governmental regulation mandating access for military recruiters, the constitutionality of the statute can still somehow be sustained as a condition on the receipt of federal funds. In doing so, petitioners distort this Court's longstanding doctrine prohibiting unconstitutional conditions.

A. The Unconstitutional Conditions Doctrine Prohibits The Government From Withholding Federal Funds From An Entity Because The Entity Is Exercising Its First Amendment Rights If The Government Could Not Regulate That Exercise Directly

Under the unconstitutional conditions doctrine, the government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that

benefit." *United States v. American Library Ass'n*, 539 U.S. 194, 210 (2003) (plurality) (quoting *Board of Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry v. Sinderman*, 408 U.S. 593, 597 (1973))); *see also Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983) ("[It] is certainly correct * * * that we have held that the government may not deny a benefit to a person because he exercises a constitutional right.").

The unconstitutional conditions doctrine is a manifestation of the broader doctrine that "an indirect attempt to accomplish what the Constitution prohibits [the government] from accomplishing directly" is unconstitutional because "[c]onstitutional rights would be of little value if they could be . . . indirectly denied." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829-830 (1995) (internal quotation marks omitted).

The Solomon Amendment denies a benefit (significant amounts of federal financial assistance) to an academic institution if the institution exercises its First Amendment right to refuse, or allows one of its components to refuse, to speak on behalf of and associate with employers that discriminate on the basis of irrelevant personal characteristics. This denial of federal financial assistance to such academic institutions is an abridgement by the government of the institution's First Amendment rights because the government is penalizing the exercise of those rights.

This denial of federal financial assistance is like the denial of a state tax exemption in *Speiser v. Randall*, 357 U.S. 513 (1958), which the Court found unconstitutionally abridged speech. In that case, the Court held that a California law that denied an otherwise available tax exemption to qualified individuals (veterans) if they refused to engage in certain speech (signing a loyalty oath) would "have the effect of coercing the claimants" and thus was "a limitation on free speech." *Id.* at 518-519; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 603-604

(1983) ("[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools," and can be withdrawn only when "no 'less restrictive means,' are available to achieve" a compelling governmental interest).

Similarly, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Court held that the government could not withhold from an employee the benefit of transferring from one government job to another based on the employee's exercising his First Amendment rights, unless withholding the job location transfer was "narrowly tailored to further vital government interests." *Id.* at 74. There, the government had denied its employee the transfer due to his political affiliation, which the Court ruled "impermissibly encroach[ed] on First Amendment freedoms" because the "long daily commutes" that the employee had to endure absent the transfer imposed "significant penalties" on "the exercise of rights guaranteed by the First Amendment." *Ibid.*; *see also American Library Ass'n*, 539 U.S. at 212 n.6 (plurality) (holding that *Rutan* "involved true penalties").

The denial of substantial sums of federal money to an academic institution is akin to, and indeed of a greater magnitude than, the denial of a tax exemption or a job location transfer, and thus clearly constitutes a government penalty that is unconstitutional if the condition would abridge First Amendment rights if imposed directly. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 827-829 (1995) ("the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression").

But petitioners attempt to avoid the unconstitutional conditions doctrine in this case by describing certain narrow exceptions to that doctrine as if they were the rule. Once these exceptions are cleared away, however, as we do

below, it is apparent that petitioners have only the refrain that, because the government could elect not to fund academic institutions at all and an institution could decline the funds, the government can impose whatever conditions it wishes on the receipt of those funds. Pet. Br. 24, 40, 41. That, of course, is the very proposition that this Court's unconstitutional conditions cases have consistently rejected for more than a century. *See, e.g., Barron v. Burnside*, 121 U.S. 186, 200 (1887) ("As the Iowa statute makes the right to a permit [to do business in the State] dependent upon the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States, the statute requiring the permit must he held to be void."); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the [right].").

The government's suggestion that it may bribe an entity or individual to forego its constitutional rights by a promise of greater funding (or of not withdrawing funding) has been rejected because it has no logical stopping point. As the Court succinctly explained in *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593 (1926), "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Thus, the Solomon Amendment's design as a condition on federal funds is not determinative of the constitutional inquiry. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 401 n.27 (1984) (rejecting the argument that "a lesser degree of judicial scrutiny was required simply because Government funds were involved"). Like all

statutes that curtail First Amendment rights, the Solomon Amendment must meet strict scrutiny (or, at the very least, the intermediate scrutiny standard described in *United States v. O'Brien*, 391 U.S. 367 (1968)) to survive a constitutional challenge. The court of appeals correctly ruled that the Solomon Amendment does not meet that standard because, in short, the government has not demonstrated that it cannot recruit effectively by means that impose less burdens on the First Amendment. Pet. App. 23a-24a, 40a, 45a-46a.

B. Petitioners Err In Relying On Cases That Reflect The Unexceptional Proposition That The Unconstitutional Conditions Doctrine Has A Narrower Scope When The Government Directs The Way Federal Dollars Are Spent By Recipients

Seeking to avoid the plain import of this Court's "well-settled doctrine" that the government cannot obtain through the threat of withholding benefits what it cannot require directly, *Dolan*, 512 U.S. at 385, petitioners invoke cases that rejected unconstitutional conditions challenges to government conditions that are tied to particular federal spending programs. But these cases recognize only that, when the government establishes a program or subsidy for specified ends, the government may "insist[] that public funds be spent for the purposes for which they were authorized." *Rust v. Sullivan*, 500 U.S. 173, 196 (1991); *see also American Library Ass'n*, 539 U.S. at 211-212 (plurality); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 583-585 (1998).

When conditions on federal funding have been tied to a particular program for which the federal funds are offered, the conditions have been upheld by the Court against unconstitutional conditions challenges in certain circumstances. For purposes of the unconstitutional

conditions doctrine, valid conditions on specific federal spending programs are limited to cases in which the condition is required to advance the "programmatic message" of the funding program to which the condition was attached. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (holding that the lack of "programmatic message" in the funding for Legal Services Corporation distinguished the restriction on program recipients from the restrictions in *Rust* and "place[d] it beyond any congressional funding condition approved in the past by this Court"). And there are constitutional limits on how a federal program can be described in such cases. The government cannot, for example, describe a grant for cancer research as a program "to develop cures for cancer at academic institutions that allow military recruiting." The Court has emphasized that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Id.* at 547.

Rust is an example of this category of cases, where the Court rejected an unconstitutional conditions challenge to a federal statute that dictated how particular federal funds could be spent. But that ruling made clear that the receipt of federal funds was tied to the particular program that Congress intended to further and was not conditioned on how the recipient spent other funds. 500 U.S. at 199 n.5 ("The regulations are limited to Title X funds; the recipient remains free to use private, non-Title X funds to finance abortion-related activities.").

By contrast, when, as in this case, the federal benefits that the government threatens to withdraw are not limited to a particular program, the statute must be reviewed, for First Amendment purposes, as if it were a direct government regulation of the entity. This category of case is exemplified by *FCC v. League of Women Voters*, where the Court found that a federal statute prohibiting

noncommercial television stations from engaging in editorializing violated the First Amendment. There, the prohibition's tie to federal funds was irrelevant because the breadth of the prohibition extended well beyond the funding received without any justification. *See* 468 U.S. at 400-401; *see also Rust*, 500 U.S. at 197 ("our 'unconstitutional conditions' cases involve situations in which the Government has * * * effectively prohibit[ed] the recipient from engaging in the protected conduct outside the scope of the federally funded program"). Similarly, this Court held in *Harris v. McRae*, 448 U.S. 297 (1980), that Congress could withhold federal assistance that would have paid for abortions for indigent women, but noted at the same time that "[a] substantial constitutional question would arise if Congress had attempted to withhold *all* Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." *Id.* at 317 n.19 (emphasis added).

The Solomon Amendment is in this second category because it is not limited to conditioning receipt of federal funds on how those federal funds are spent. Petitioners point to nothing in the record that suggests that any of the federal funds received by the academic institutions (or respondent FAIR's law school members) are directed for spending on recruitment services. Rather the Solomon Amendment is a condition attached to hundreds of discrete spending programs that have nothing at all to do with the recruitment of lawyers for the military. It therefore does not fall within the exception from the unconstitutional conditions doctrine for conditions that are tied to federal funding for particular programs.

C. Even If The Solomon Amendment Were Tied To The Way Particular Federal Funds Are Spent By A Recipient, It Would Still Be An Unconstitutional Condition Because It Aims To Suppress A Specific Viewpoint

1. The unconstitutional conditions doctrine is not limited, as petitioners claim, to prohibiting only government conditions on funding that aim to suppress ideas that the government views as "dangerous." Pet. Br. 41 (citing *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1989)). Indeed, this Court has "emphasized that conditions upon public benefits cannot be sustained if they so operate, *whatever their purpose*, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (emphasis added). Thus, in *Sherbert*, the Court held that the State could not deny unemployment benefits to a woman who refused to work on Saturdays when doing so would force her either to forgo her religious practice or to forfeit government benefits, even though the State did not disapprove of the woman's religion or view the religion as dangerous.

The Court has never held that conditions on federal funding are unconstitutional only if aimed at suppressing dangerous ideas. Petitioners rely on a section in *Finley* where the Court noted an apparent exception to the general rule that the government's motives are irrelevant in determining the constitutionality of a condition on federal funding because, there, Congress placed a condition on "competitive" funding for the arts that was intended to be used for the particular purpose of promoting "excellence" in art. The Court held that the First Amendment "certainly has application" in that context, but reasoned that the government had more latitude than if it were regulating art directly. Thus, the Court required only that the government "not 'ai[m] at the suppression of dangerous ideas,' and if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate."

524 U.S. at 587. The Court also cautioned, however, that "a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Ibid.*

Finley thus means only that an invidious purpose on the part of the government is one ground (apparently distinct from assessing the "coercive effect" or "disproportionate burden") for invalidating a condition that curtails constitutional rights when the condition applies to a selective funding program, relates directly to the underlying purpose of the funding program, and applies to the use of only the federal funds themselves. This is not the situation with the Solomon Amendment. Unlike the statute in *Finley*, the government's condition here is not tied directly to a benefit that is awarded on subjective, competitive criteria. Instead, the condition imposed by the Solomon Amendment applies to a host of federal funds that themselves have no nexus to the First Amendment right that the government is seeking to have respondent FAIR's members abandon.

2. Even if petitioners were correct that, as a result of *Finley*, the unconstitutional conditions doctrine applies only where the government intends to suppress a specific viewpoint, the Solomon Amendment would still be invalid. The government's assertion of a facially reasonable, even compelling, rationale for the Solomon Amendment – that it serves to promote military recruiting – cannot render the statute constitutional if the statute is "*in fact* based on the desire to suppress a specific point of view." *Cornelius v. NAACP*, 473 U.S. 788, 811-812 (1985) (emphasis added).

The government's claim that the statute is "entirely indifferent to an institution's reason for denying equal access," Pet. Br. 42, is belied by the express exemption in the text for institutions that exclude military recruiters because the institutions have a "longstanding policy of

pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2). That statutory exemption, added in 1996, for policies that are motivated by longstanding pacifism principles rather than nondiscrimination principles, unequivocally demonstrates that the viewpoint underlying an institution's policy that excludes military recruiters was dispositive to Congress. At bottom, Congress authorized federal funds to go to institutions that exclude military recruiters so long as it found acceptable the viewpoint supporting the institution's policy. *See* 142 Cong. Rec. 12,712-12,713 (1996) (Rep. Goodlatte) (explaining support for exemption for those not participating in military activities based upon their deeply found religious beliefs" because "I think if they are not simply antimilitary based upon a political position of the time but rather have that deep-seated opinion, then they should have that exemption and should still be able to apply for funds for legitimate scientific programs at their institutions").

The statutory exemption reflects the intent of Congress. *See United States v. Eichman*, 496 U.S. 310, 317 (1990) (examining "precise language" and "explicit exemption" in statute in determining Congress's intent). Congress made clear that an exclusion based on "antimilitary" opinion is not a disqualifying ground for receipt of federal funds, but that such an exclusion (or even limited access) is disqualifying when promulgated by an institution that refuses to be forced to support recruiting of its students by employers who discriminate against students on the basis of sexual orientation, in violation of the institution's stated policies and mission. *Cf.* 140 Cong. Rec. 11,442 (1994) (Rep. Engel) (explaining, in opposition to the Amendment generally, that "the denial of military recruiting on certain campuses is based not on an antimilitary ideological stance, but rather, on the principles of law" that "prohibit access to recruitment facilities to all employers who discriminate on the basis of sexual orientation, including the military").

Moreover, the statute, by implication, and its implementing regulations by their express terms do not require the withholding of federal funds from academic institutions that exclude military recruiters so long as the institutions exclude all recruiters. *See* 32 C.F.R. § 216.4(c)(3). They also allow federal funding to institutions that exclude military recruiters by relying on student interest to determine who to allow on campus and students express no interest in hearing from military recruiters. *See id.* § 216.4(c)(6)(ii). Although these exceptions are viewpoint neutral, they make clear that it is an institution's viewpoint for limiting military recruiters' access, not the limitation itself, that is determinative of whether the institution is penalized by denial of federal funds.

3. The events surrounding the Solomon Amendment's passage confirm that the statute was motivated to suppress a particular point of view rather than to remove any significant barrier to military recruiting. The initial passage of the statute was opposed by the Department of Defense. The Department of Defense explained that the legislation was not needed in order to ensure the availability of qualified military recruits. *See* 140 Cong. Rec. 11,441 (1994) (Rep. Schroeder) (discussing views of Department of Defense).

Legislators who spoke in favor of the Solomon Amendment made clear that they supported the legislation because it would suppress policies that were motivated by a viewpoint with which they disagreed, *i.e.*, one that sought to protect students from discriminatory practices of employers, including the military. *See, e.g.*, 140 Cong. Rec. 11,441 (1994) (Rep. Pombo) ("A growing, and misguided, sense of moral superiority is creeping into the policies of colleges and universities in this country when it comes to such things as military recruiting * * * on campus" and they "need to be put on notice that their policies of

ambivalence or hostility towards our Nation's armed services do not go unnoticed – either by this House or by the American people."); *id.* at 12,358 (Rep. Bereuter) ("In banning military recruiters, the universities are making wholly inappropriate value judgments about the Armed Forces" by reacting to "the Pentagon's position on homosexuals in the military"); *id.* at 11,441 (Rep. Rohrbacher) (academic institutions that exclude military recruiters "insult our military personnel" and "do not care about our Nation's security," but instead "have given in to these political activists, who seek to use the military to achieve a domestic social agenda").

Members of Congress made clear that they supported the Solomon Amendment precisely because the threatened withholding of federal funds would "send a message" to academic institutions that excluded military recruiters based on opposition to the military's discriminatory employment policy. 141 Cong. Rec. 15,949 (1995) (Rep. Pombo); *see also id.* at 595 (Rep. Solomon) ("I am told by the Pentagon that schools across the country are getting the message and preparing to accommodate recruiters rather than lose their precious funding.").

II. The Unconstitutionality Of The Solomon Amendment Does Not Undermine The Constitutionally Valid Federal Spending Clause Statutes That Prohibit Federal Financial Assistance For Entities That Discriminate Against Individuals On The Basis Of Irrelevant Personal Characteristics

Over the course of the past 40 years, Congress has exercised its authority under the Spending Clause, Art. I, § 8, cl. 1, to prohibit federal funding of entities that discriminate on the basis of personal characteristics irrelevant

to individual ability or merit, in furtherance of the Equal Protection Clause's goal that each individual be judged "by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Although such federal civil rights statutes rely upon the analogous Spending Clause authority as the Solomon Amendment, these statutes are distinct from the Solomon Amendment in several respects material to the determination of their constitutionality under the unconstitutional conditions doctrine.

A. The Federal Civil Rights Statutes Further Compelling Governmental Interests, And May Be Constitutionally Mandated In Some Instances

1. The foundational civil rights statute under the Spending Clause is Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits federal agencies from providing financial assistance to entities that discriminate on the basis of race, color, or national origin. This Court recognized in *Lau v. Nichols*, 414 U.S. 563 (1974), that Congress enacted Title VI because "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Id.* at 569 (quoting 110 Cong. Rec. 6543 (1964) (Sen. Humphrey, quoting from President Kennedy's message to Congress)). *Lau* held that Title VI was a valid exercise of Congress's power under the Spending Clause "to fix the terms on which its money allotments to the States shall be disbursed." *Id.* at 569.[3]

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[3] In *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001), the Court rejected *Lau*'s interpretation of Title VI "as reaching beyond intentional discrimination," but did not cast doubt on *Lau's* ruling on the Spending Clause.

Congress subsequently used Title VI as a model for enactment of additional statutes that prohibit federal agencies from providing funds to entities that discriminate on the basis of other irrelevant personal characteristics. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (sex); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (disability); Age Discrimination Act of 1975, 42 U.S.C. § 6101 (age).[4]

The federal civil rights statutes are valid exercises of Congress's authority under the Spending Clause and the Fourteenth Amendment to ensure that federal funds are not spent in support of policies that violate the letter and spirit of the Equal Protection Clause. This has been the uniform holding of the lower courts that have addressed the issue, all sustaining these statutes as valid Spending Clause legislation. *See, e.g., Barbour v. WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1591 (2005); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128-129 (1st Cir. 2003); *Koslow v. Pennsylvania*, 302 F.3d 161, 169-171 (3d Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003); *Constantine v. George Mason Univ.*, 411 F.3d 474, 493 (4th Cir. 2005); *Miller v. Texas Tech Univ. Health Scis. Ctr.*, No. 02-10190, 2005 U.S. App. LEXIS 17244 (5th Cir. Aug. 15, 2005) (en banc); *Jim C. v. Arkansas Dep't of Educ.*, 235 F.3d 1079, 1084 (8th Cir. 2000) (en banc), *cert. denied*, 533 U.S. 949 (2001); *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *United States v. Louisiana*, 692 F. Supp. 642, 652 (E.D. La. 1988) (three-judge court).

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[4] State and local governments likewise have decided not to bestow taxpayer money on entities that discriminate against some of those taxpayers on the basis of other irrelevant personal characteristics such as sexual orientation. *See, e.g.*, Conn. Gen. Stat. § 46a-81n(b); Berkeley, Cal., Mun. Code § 13.28.060(A)(3).

2. This Court has made clear that the government has a compelling interest in avoiding funding private entities that discriminate against individuals on the basis of irrelevant personal characteristics. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality); *see Bob Jones Univ. v. United States*, 461 U.S. 574, 591, 593 (1983) ("Government has a fundamental, overriding interest in eradicating racial discrimination in education," which warrants denial of tax exemptions to discriminatory private schools because "[w]hen the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors' ").[5]

Further, these civil rights statutes may, unlike the Solomon Amendment, reflect a constitutional prohibition against government funding of invidious private discrimination. *See Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("State support of segregated schools through any arrangement,

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[5] The governmental interest in not giving taxpayers' money to private entities that discriminate against some of those taxpayers is distinct from the governmental interest in preventing discrimination, which is a separate compelling interest that supports the constitutionality of these statutes as well. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (State's "compelling interest in eradicating discrimination against its female citizens justifies" the burden placed on a group's associational freedoms); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 92 n.5 (2d Cir. 2003) (separate opinion of Calabresi, J.) ("a state that has adopted a policy of equal protection with respect to a specific group may have a compelling interest in the enforcement of that policy, even if the federal government has not recognized that same group's claim to heightened scrutiny for the purposes of equal protection"), *cert. denied*, 541 U.S. 903 (2004).

management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws"); *Norwood v. Harrison*, 413 U.S. 455, 466 (1973) ("A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination."); *Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974) ("The constitutional obligation of the State 'requires it to steer clear not only of operating the old dual system of racially segregated schools but also of giving significant aid to institutions that practice racial or other invidious discrimination.'"); *United States v. Virginia*, 518 U.S. 515, 599 (1996) (Scalia, J., dissenting) (suggesting that the Court's cases mandate a holding that "the government itself would be violating the Constitution by providing state support to single-sex colleges").

The government's compelling interest in not funding invidious private discrimination is bolstered by the fact that the Constitution grants scant protection to the right of private entities to discriminate against individuals on the basis of irrelevant personal characteristics. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) ("'[I]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.' There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union."); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (same). Thus, even where the government has the constitutional discretion whether to fund a discriminatory entity, it may elect not to do so simply to avoid supporting discriminatory entities. *Cf. Norwood*, 413 U.S. at 463 ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."); *Boy Scouts of Am.*

v. Wyman, 335 F.3d 80, 97-98 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004).

B. The Civil Rights Statutes Do Not Seek Merely To Alter The Behavior Of Fund Recipients, But To Protect The Rights Of All Of The Government's Taxpayers, Including Those Who Are Victims Of The Recipient's Discrimination

The civil rights statutes that prohibit federal funding of entities that engage in invidious discrimination against individuals are distinct from the Solomon Amendment also because the primary goal of the civil rights statutes is to prevent the federal government, and its taxpayers, from funding such discrimination. *See Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) ("Congress wanted to avoid the use of federal resources to support discriminatory practices"). And the only way to achieve that compelling interest (narrowly tailored or otherwise) is to deny federal funds to entities that discriminate. *Cf. Bob Jones Univ.*, 461 U.S. at 604 ("no 'less restrictive means' are available to achieve the governmental interest" in avoiding subsidizing discrimination than to not subsidize discrimination).

The injury to taxpayers from government funding of invidiously discriminatory entities is not merely a matter of citizens' disagreement with a private institution's policies. Rather, government funding of discriminatory entities would force some taxpayers to subsidize an organization that they, themselves, could not benefit from simply because of irrelevant personal characteristics.

No such claims can be made if some portion of the public objected to the limitations placed by academic institutions on the access allowed recruiters for the military and other employers who discriminate. Although recruiters *qua* recruiters might be barred from campuses,

that would be only in the context of recruiting activities, not as individuals or taxpayers and not based on irrelevant personal characteristics.

The Solomon Amendment was enacted solely to change behavior of academic institutions and to punish those that did not change. The government does not claim that federal funding of such entities, itself, imposes any independent injury on the federal government. The only legitimate interest purportedly underlying the Solomon Amendment is an instrumental one – the use of the significant federal purse strings to coerce academic institutions to speak for and associate with a discriminatory employer.

That is distinct from the civil rights statutes that Congress enacted pursuant to its Spending Clause authority to prohibit federal financial support of entities that invidiously discriminate against individuals. And this case is therefore distinct from the Court's cursory rejection of a First Amendment challenge to Title IX in *Grove City College v. Bell*, 465 U.S. 555 (1984), which was warranted because of the government's compelling interest in avoiding funding private discrimination. Grove City College had argued that, even if it were deemed to receive federal financial assistance and was thus covered by Title IX's proscription against sex discrimination, Title IX could not be applied to it because to do so would infringe its First Amendment right to be free to choose whether to discriminate on the basis of sex "without government compulsion." Pet. Br., *Grove City College v. Bell*, No. 82-792, at 47-50. Grove City did not rely on the unconstitutional conditions cases (or, in fact, any First Amendment cases) in its brief. When the Court rejected Grove City's argument, it explained that "Congress is free to attach *reasonable* and unambiguous conditions to federal financial assistance

that educational institutions are not obligated to accept." 465 U.S. at 575 (emphasis added).

That sentence is not, however, the definitive statement of the general limits that the Constitution places on denial of federal funds to academic institutions that refuse to exercise their constitutional rights in a manner desired by the federal government, other than in the circumstance of discrimination against taxpayers based on personal characteristics. Other than that unique area of avoiding federal funding of such discriminatory institutions, there is no indication of any broader reach, much less any indication of an overruling of the entire unconstitutional conditions doctrine. Indeed, the only authority cited by the Court to support that proposition in *Grove City* was *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), which involves only Congress's authority under the Spending Clause, and is not part of the large body of existing case law expounding the unconstitutional conditions doctrine.

Grove City reflects this Court's deep-seated understanding that non-discrimination conditions on financial assistance are constitutional because a proscription on discrimination based on an irrelevant personal characteristic, such as sex, furthers the compelling governmental interest in not subsidizing such discrimination and is the only means to achieve that interest. The Solomon Amendment, by contrast, was intended solely to alter the behavior of academic institutions to force them to disseminate the government's message, rather than to ensure that taxpayers' dollars not subsidize activities that certain taxpayers do not have an equal opportunity in which to participate due to discrimination.

C. Discrimination, Unlike The Recruiting At Issue In This Case, Cannot Easily Be Cabined Within One Program And Thus Entity-Wide Conditions Are Necessary To Further The Government's Anti-Discrimination Goal But Not Its Interest In Military Recruiting

Petitioners note (Pet. Br. 43 n.7) that the federal civil rights statutes, like the Solomon Amendment, all apply to the entirety of an entity that receives federal funds, and not just to the particular program that is directly supported by the federal funds. But the extension of the federal civil rights statutes to prohibit funding to the entirety of an entity was rooted in unique features about the nature of discrimination against individuals that justifies the reach of those statutes but does not justify the Solomon Amendment's similar coverage.

Congress extended the scope of the funding condition in response to this Court's holding in *Grove City* that the term "program or activity" as used in Title IX was limited to the recipient's program that accepted the money, and did not apply the non-discrimination prohibition to the entire institution. Following that ruling, Congress engaged in extensive hearings and deliberations that culminated in enactment of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). That statute defines the term "program or activity" in Title VI, Title IX, Section 504, and the Age Discrimination Act to mean, for governmental entities, "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government * * * any part of which is extended Federal financial assistance." 42 U.S.C. § 2000d-4a(1)(A); 20 U.S.C. § 1687(1)(a); 29 U.S.C. § 794(b)(1)(A); 42 U.S.C. § 6107(4)(A).

Congress thus determined that the infectious nature of discriminatory policies demanded that the denial of government support for an institution engaging in

discrimination be institution-wide rather than program specific. This Court had previously reached the same conclusion under the Constitution. *See Norwood*, 413 U.S. at 468-469 ("[L]egitimate educational function cannot be isolated from discriminatory practices * * * . [D]iscriminatory treatment exerts a pervasive influence on the entire educational process."); *Bob Jones Univ.*, 461 U.S. at 592 ("The *institution's* purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." (emphasis added)).

When Congress was considering the extension of the federal civil rights statutes funding restrictions to the entirety of an entity, there were findings that restrictions specific just to a particular program at an institution would still risk the public perception that the government endorses discrimination. *See Civil Rights Act of 1984: Joint Hearings on H.R. 5490 Before the House Comm. on Educ. & Labor and the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 98th Cong. 39 (1984) (statement of Rep. Anderson) ("Our failure to clarify the intent of these statutes would be tantamount to condoning discrimination at colleges and universities benefitting [sic] from Federal assistance.") [hereinafter 1984 House Hearings]; *id.* at 157 (statement of Arthur Fleming, Chairman, Citizens Commission on Civil Rights) ("We would not only be tolerating, we would be putting an official stamp of approval on discriminatory practices by institutions that are helping the Federal Government to discharge its responsibilities to its citizens."); *Civil Rights Restoration Act of 1987: Hearings Before the Senate Comm. on Labor & Human Resources*, 100th Cong. 7 (1987) (statement of Sen. Metzenbaum) ("It is impossible to compartmentalize discrimination. If one part of an institution discriminates, then the entire institution is tainted by that discrimination.").

In addition, from a practical perspective, allowing discrimination in one program undermines the benefits of prohibiting discrimination in another program, because only partial discouragement to students defeats the government's interest in equal access to educational opportunities. *See* 131 Cong. Rec. 2156-2157 (1985) (Sen. Packwood) ("[D]iscrimination in education is subtle but pernicious, affecting its victims for the entirety of their lives. The absurdity of the result [in *Grove City*] is apparent. It is of little use to bar discrimination in the financial aid program of an institution if a woman cannot gain admittance to, or participate in, the institution because of its other discriminatory policies and practices."); 130 Cong. Rec. 9260 (1984) (Sen. Dole) ("What difference does it make to a disabled student if the student financial aid office is in compliance with section 504, if none of the school's academic programs are accessible."); 1984 House Hearings, *supra*, at 18 (statement of Rep. Panetta) ("If you have discrimination in one aspect of an institution's operations, there is just no question that it infects the operations of the entire institution. * * * You can't have discrimination in simply one aspect and hope that somehow it doesn't impact on other areas."). Accordingly, the anti-discrimination conditions on federal funding are necessary to advance the government's compelling interest.

In contrast, such considerations cannot support the argument that restrictions on an entire academic institution are required to promote military recruiting. Any claim that funding restrictions on an entire academic institution, including divergent research programs throughout the campus, is the only means to convince the institution to increase access of military recruiters to a particular program, hinges on the blunt instrument of unlawful coercion.

CONCLUSION

For the reasons set forth above and in the respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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SEPTEMBER 21, 2005